Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

NO. 80-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner

v.

MOBIL OIL CORPORATION,
Respondent

On Writ of Certiorari to the Court of Civil Appeals For the Fourteenth Supreme Judicial District of Texas

REPLY BRIEF OF PETITIONER GULF OFFSHORE COMPANY, A DIVISION OF THE POOL COMPANY

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ARGUMENT IN REPLY

INTRODUCTION

Petitioner offers this Reply Brief to supplement its Petition by bringing to the Court's attention a newly reported decision of another Louisiana appellate court finding in favor of the exclusivity of federal court jurisdiction in Outer Continental Shelf Lands Act cases, i.e., *Pool v. Kemper Insurance Group*, 386 So.2d 1006 (La. App. 1980). This latest decision reinforces the conflict between

Texas and Louisiana appellate courts on this important jurisdictional issue involving a federal statute.

Petitioner also takes this occasion to point out that Respondents' arguments on the jurisdiction issue actually emphasize the necessity of this Court granting the writ so that careful consideration can be afforded this significant jurisdictional dispute and meaningful guidance can be given to the federal and state trial courts. Avoiding or delaying consideration of the question by denying the writ would only perpetuate the forum shopping and removal problems presently caused by the split in authority between the Texas courts on the one hand and the Louisiana state and Louisiana/Texas federal district courts on the other hand.

Finally, Petitioner will show that Respondents' efforts to avoid the application of *Norfolk & Western Railway Company v. Liepelt*, 48 U.S.L.W. 4132 (Feb. 19, 1980), to this case are without merit.

I.

EXCLUSIVITY OF FEDERAL COURT JURISDICTION—THE TEXAS/LOUISIANA, TEXAS/FEDERAL DISTRICT COURT CONFLICT NECESSITATES REVIEW ON WRIT OF CERTIORARI

The Petition demonstrates several special and important reasons for review on writ of certiorari, beginning with the importance of this question affecting the jurisdiction of the federal courts and emphasizing the conflict regarding that question between the Texas Court of Civil Appeals in this case and both the Louisiana appellate courts and Texas/Louisiana federal district courts in all other reported decisions.

The latest reported decision on the question of exclusivity of federal court jurisdiction over Lands Act cases, *Pool v. Kemper Insurance Group,* 386 So.2d 1006 (La. App. 1980), adds to the list of holdings in favor of exclusivity and reinforces the conflict between the courts of Texas and Louisiana regarding this significant federal question.

In *Pool,* a case involving a claim for personal injuries sustained in an offshore oil rig accident, the state trial court entered a judgment dismissing the case for want of subject matter jurisdiction. On appeal by the plaintiff, the Louisiana Circuit Court of Appeals affirmed, holding, *inter alia,* that the purpose of the Lands Act was to vest all civil and political jurisdiction in matters involving offshore drilling activities on the Outer Continental Shelf exclusively in the federal courts.

Subject matter jurisdiction is of fundamental importance in all litigation. The question of whether federal court jurisdiction is *exclusive* in Lands Act cases is vital to every lawsuit arising out of activity in the Lands Act area. How can practitioners and judges have any confidence in the jurisdictional validity of such cases filed in state court unless the present conflict between Texas state courts, Louisiana state courts and federal district courts in both states is definitively resolved?

Although Respondents treat the jurisdiction question as if Petitioner's position is an absurdity, *all* of the decisional law except the opinion of the court below favors the exclusivity of federal court jurisdiction as the more well-reasoned interpretation of the Lands Act statutory language, taken as a whole. If Respondents' arguments are so unequivocally and undeniably correct, how, then, does

one explain the fact that every court which has considered the issue except the court below has held against Respondents' position? Respondents' arguments to the effect that the federal district court decisions "are hardly persuasive" and that the Court of Civil Appeals in this case was correct in its decision to "follow the dissent" in *Gravois v. Travelers Indemnity Company,* 173 So.2d 550 (La. App. 1965) (writ ref'd. 247 La. 1016, 175 So.2d 301), simply highlight the importance of having this jurisdictional conflict resolved by this Court.

Given the clear split of authority on this important jurisdictional question, how would the jurisprudence in this expanding field of litigation be served by avoiding or delaying a definitive answer? Denial of the writ would leave the law on this point confused and in conflict.

The question of whether state courts have subject matter jurisdiction to hear causes of action pursuant to the Lands Act is of obvious importance and is ripe for decision. The writ of certiorari petitioned for should be granted.

II.

THE LIEPELT INSTRUCTION— PROPERLY SUBMITTED, PRESERVED AND APPLICABLE

Respondents contend that Petitioner's requested jury instruction that any award of damages would not be subject to federal income taxation was not properly submitted, was not properly preserved as error, and, in any event, was not applicable in this case. Petitioner will show that these allegations are entirely without merit. The requested instruction was based on reasonable inferences that might be drawn from the evidence, which is the

appropriate legal standard in Texas. The error in refusing the instruction was properly preserved, as most eloquently demonstrated by the Court of Civil Appeals' discussion of the point on the merits in its opinion. Finally, federal law concerning such an instruction is clearly applicable as the Lands Act mandates use of federal law with resort to state law concepts only where a gap exists in the controlling federal law.

a. Properly Submitted

Under Texas procedure, a jury instruction is proper "if it finds support in any evidence of probative value or the reasonable inferences that may be drawn therefrom, and if it might be of some aid or assistance to the jury in answering the issues submitted." *Mejia v. Liberty Mutual Ins. Co.*, 544 S.W.2d 690 (Tex. Civ. App.—Houston (14th Dist.) 1976). Under Texas law, it is the duty of the trial court to give the jury, in its charge, the rule to be applied in ascertaining the damages. *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87 (Tex. 1973). The record clearly reflects probative evidence on the issue of damages and it cannot, in good faith, be denied that a reasonable inference that might be drawn from such evidence is that the damage award would be subject to federal income taxation. "Damages must be measured by a legal standard, and that standard must be used to guide the fact finder in determining what sum would compensate the injured party." *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. 1973). The requested instruction set forth the appropriate legal standard and clearly would have assisted the jury in determining the appropriate compensation for the plaintiff.

Contrary to Respondents' assertion, there is absolutely no *caveat* in the *Liepelt* opinion that the jury instruction must be predicated on evidence in the record regarding federal income taxes. The two questions addressed in *Liepelt*, the admissibility of evidence and the appropriateness of a jury instruction, are separate and distinct from one another. The *Liepelt* holding regarding the appropriateness of such a jury instruction is grounded on policy considerations, including what an average juror is likely to assume regarding taxation of a damage award. The Court's holding in *Liepelt* is clearly predicated on the tax consciousness of the average juror and *not* on the evidence that such juror may have heard during the course of a particular trial.

Submission of the instruction was proper under Texas law and Petitioner's requested instruction complied with the applicable rule of procedure regarding such instructions. Rule 273, Texas Rules of Civil Procedure (Respondent Mobil's Brief—Appendix B).

b. Properly Preserved

Respondents say that the failure to give Petitioner's requested *Liepelt* instruction was not preserved as error because the trial judge did not write the word "refused" on the requested instructions at the time of refusing them and signed his name only to the top instruction of a set of three instructions which he was refusing. Petitioner's requested instruction was clearly refused as it does not appear as part of the court's charge to the jury, but is undisputably part of the official court records. The three instructions Petitioner requested were stapled together in sequential order and the judge simply signed the top one to signify his refusal to submit them.

Respondents' "waiver" argument is entirely spurious, as most clearly evidenced by the fact that the Court of Civil Appeals found no waiver with respect to the point. The Court of Civil Appeals opinion addressed the question on the merits and the court obviously would not have done so had the point been waived as contended by Respondents. (Court of Civil Appeals Opinion—Petition Appendix—A-16 to A-17.)

c. Liepelt Applicable

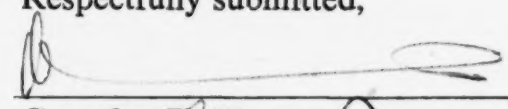
Respondent Mobil's position is that *Liepelt* is inapplicable on the basis of the implicit assumption that national uniformity was rejected by Congress in the Lands Act. The argument fails because the assumption is incorrect. The Lands Act clearly provides for federal law to be applicable and state law to be used only to fill gaps in the federal law. Obviously, there is no gap in the federal law on the question of the appropriateness of a *Liepelt* jury instruction. The policy considerations relied upon in *Liepelt* clearly apply in Lands Act cases, as well as in FELA cases.

Respondent Gaedecke, disagreeing with Respondent Mobil, says that this is not a federally created statutory cause of action, but instead a common law negligence case. Consequently, the thrust of this Respondent's argument entails the desirability of "adopting" federal law as expressed by *Liepelt*. As indicated above, this approach is backwards. Federal law applies in the first instance and state law is to be utilized only where there is no federal law on the point. Respondent Gaedecke is clearly incorrect in asserting that his cause of action was not derived from the Lands Act. *Bourg v. Texaco Oil Company, Inc.*, 578 F.2d 1117, 1120 (5th Cir. 1978).

CONCLUSION

For the foregoing reasons, Petitioner renews its prayer that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,



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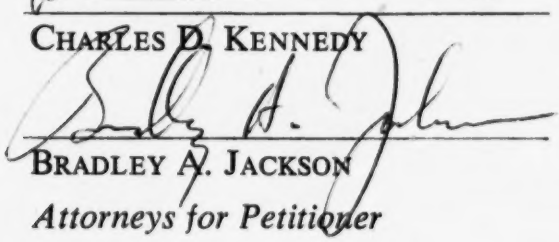

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CERTIFICATE OF SERVICE

This is to certify that three copies of this Reply Brief have been served on all parties required to be served, *i.e.*, on Respondent by placing same in an envelope and depositing it in the United States mail with first-class postage prepaid, addressed to counsel of record as follows, Frank Caton, Esq., Crain, Caton, James and Womble, 3300 Two Houston Center, Houston, Texas 77010, and on the Plaintiff in the Trial Court by placing same in an envelope and depositing it in the United States mail, with first-class postage prepaid, addressed to counsel of record as follows, Joseph D. Jamail, Esq., Jamail & Kolius, 3300 One Allen Center, Houston, Texas 77002, this 25th day of November, 1980.

CHARLES D. KENNEDY